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In the Supreme Court of the United States

OCTOBER TERM, 1972

72-389

FRANK ZIZZO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, and JAMES TRAEGER, UNITED STATES MARSHAL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Frank Zizzo, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported but is printed in the appendix to this petition (Appendix A). The opinion of the District Court is printed in the appendix to this petition (Appendix B).

JURISDICTION

The judgment of the Court of Appeals (Appendix A) was entered on August 14, 1972. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the conclusion of the Parole Board that Zizzo was associating with a person that had a bad reputation is supported by satisfactory evidence.

2. Whether the holdings in *Morrissey, et al.* v. *Brewer, et al.*, decided June 29, 1972, 11 Cr. L. 3324, should be applied to this case.

STATEMENT

On August 29, 1963, and after a jury had returned a verdict of guilty on several counts of an indictment charging Zizzo, the petitioner herein, with violation of Title 18, U. S. C. § 1952 and § 2 (travel to further gambling business), he was sentenced five years on each count to run concurrently (R. 5).

On June 18, 1965, he was remanded into the custody of the U. S. Marshal for execution of the sentence. Zizzo was granted parole on the sentence on December 19, 1966, subject to supervision of the U. S. Probation and Parole Office, at Hammond Indiana, until June 17, 1970. On January 19, 1970, Zizzo was taken into custody by the U. S. Marshal pursuant to warrant application issued by the U.S. Board of Parole (R. 6). He remained in Federal custody at the U. S. Penitentiary, Marion, Illinois, until July 14, 1970, at which time he was released by order of the Court of Appeals pending a prior appeal on a denial of a motion under 28 U.S.C. § 2255. His conviction was thereafter set

aside, but the Supreme Court granted certiorari and remanded with instructions to reconsider. Upon reconsideration, the Court of Appeals reversed its prior decision, a revised mandate was issued and Zizzo surrended to the U. S. Marshal for the Northern District of Indiana on January 31, 1972 (R. 159).

On January 31, 1972, the Petitioner Zizzo filed his verified Petition for a Writ of Habeas Corpus, together with exhibits (R. 1-123). Said Petition alleged that Zizzo was in the custody of the United States Marshal for the Northern District of Indiana and confined in the jail of Lake County, Indiana, and imprisoned in said institution pursuant to revocation of his parole by the United States Board of Parole by Order dated April 3, 1970, pursuant to Warrant Application dated January 16, 1970, and supplemental charges dated February 25, 1970 (R. 13-15).

Said Petition, in substance, alleged that the revocation of said parole was unlawful and in violation of his constitutional rights, among other things, in this, to-wit:

a. The action of the United States Board of Parole was arbitrary and capricious.

b. The action of the United States Board of Parole was an abuse of discretion.

c. There was no satisfactory evidence to support such revocation.

The Respondents filed answer to said Petition (R. 127-133), and exhibits in support of Respondents' answer to Petition for Writ of Habeas Corpus (R. 138-151).

On February 22, 1972, the Petitioner filed a Motion to Compel discovery of a document submitted to the court in camera by the government, or in the alternative, to strike

the government's answer. The motion was denied by the court on February 24, 1972 (R. 156). On February 22, 1972, the Petitioner filed his reply to Respondents' answer. (R. 154-155).

On February 25, 1972, a hearing was had on said Petition for Habeas Corpus and the pleadings and Petitioner's Exhibits A, B, C, D, and E attached to his Petition for Habeas Corpus admitted in evidence and the matter was taken under advisement.

On March 8, 1972, the court made and entered an Order denying the Petition for Habeas Corpus (R. 158-163).

The Evidence

The charges for revocation of parole in substance were, association with persons having a criminal record and engaged in criminal activities and supplemental charges were filed of associating with persons having a criminal record, bad reputation and engaged in questionable occupations (R. 13-15).

It does not appear that Zizzo was ever aware of the alleged activities or reputation of the persons involved. Zizzo operated a restaurant and carry-out services in Gary, Indiana, and said alleged associations occurred mainly in said restaurant openly and notoriously while said persons would be there as customers. Zizzo, at the time of revocation of his parole, had approximately five months remaining before his parole would expire on June 17, 1970. He was charged with associating with Anthony P. Gruttadauro as well as several other persons. In his report to the Parole Board, the Examiner found the evidence insufficient to sustain the charge of associating with the other persons and noted the absence of satisfactory evidence that these persons were currently engaged in criminal activity and that the convictions of those who had any

criminal record were remote in time. This report was kept secret and Zizzo was not apprised of its contents until the Court of Appeals made the disclosure in its opinion, (App. p. 4). In light of this finding, we need not discuss the evidence in regard to the other persons. The Examiner did, however, find as facts that Gruttadauro had a bad reputation and that Zizzo was associating with him.

The record shows that Anthony P. Gruttadauro was convicted some 26 years ago of possibly a misdemeanor and was not given an executed sentence and the petitioner did not know of such conviction and the association alleged was mainly visits by Gruttadauro to Zizzo's restaurant, which restaurant was a public place and open to all (R. 51; 83-84; 97-100; 106).

On March 20, 1970, at the Gary Federal Building, Room 303, Gary, Indiana, a local parole revocation hearing was had before Joseph E. Doneghy, Hearing Examiner, at which time Zizzo, through and by his attorney, answered the charges contained in the warrant application and for the purposes of the record the transcript of the preliminary interview was at the request of the Hearing Examiner incorporated by reference (R. 47-70).

The statement appearing in the supplement to the warrant application dated February 25, 1970, that Zizzo admitted to the Parole Officer that he had frequently associated with Guttadauro was denied and explained (R. 49-51).

Mr. Wilkerson, the Parole Officer was asked why the petitioner was not warned or admonished in any way for his alleged improper activities during the last three years that he was on parole. The Parole Officer stated that an investigation by the FBI was under way at that time and

the Parole Board was being advised of the findings and further he did not feel that it was incumbent upon him to warn Zizzo to desist doing what the parole officer felt was contrary to the rules of parole and the parole officer assumed that Zizzo knew what he was doing; even though some parolees were called in to group meetings, Zizzo was never invited and the parole officer felt that it wasn't his duty to guide Zizzo when he felt he was going astray (R. 76-78).

Zizzo reiterated a statement previously made to the effect that his former parole officer, sometime in the summer of 1969, asked him if he was associating with anyone with a criminal record and Zizzo said that he was not associating with anybody, was always by himself and the only time he talked to anyone is when they came to his restaurant and if there was someone the parole officer wanted him to keep out of the restaurant to please let him know the name and the parole officer replied he did not have any names but wouldn't worry too much about it (R. 39; 79). Zizzo further stated that he has no Federal gambling stamp and never had one since his release on parole (R. 8-81).

Frank Storey, a special agent with the FBI stated that Zizzo was under surveillance and read off the dates stated in the warrant application charging that Gruttadauro visited the restaurant of Zizzo (R. 83-85). Storey further testified that Gruttadauro had a bad reputation and his uncle was Anthony Pinelli, who is an identified hoodlum originally from Chicago who now lives in California, and that the local paper has characterized Gruttadauro as a gambler, and that he believed the newspaper statements were on the whole giving an accurate picture even though on some occasions newspapers tend to not have all the in-

formation available to them (R. 87-88). Storey saw Zizzo working at the Pepperpot Restaurant on Melton Road, Gary. The majority of the time, during the surveillance of Zizzo, Storey and two other agents were inside the restaurant (R. 105-106). Gruttadauro's visits to the restaurant were not secret (R. 106). Gruttadauro's daughter was working at the restaurant (R. 106-107). Zizzo spends most of his time at his restaurant at Melton Road and Storey had received information over the last several years that Zizzo was still in control of organized crime, in Lake County, Indiana, and wanted to see who was contacting Zizzo and trying to corroborate this information. Storey assumes that Zizzo belongs to organized crime because Zizzo was the center of this whole investigation, and that is why he was being investigated. Informants had supplied the information (R. 113-114). Storey overheard Zizzo and Gruttadauro talking about real estate in the Crown Point area. The FBI does release information to newspapers concerning investigations or had released such information in regard to Zizzo (R. 112). It is the FBI's contention that once you are in organized crime you always continue being in organized crime (R. 115).

REASONS FOR GRANTING THE WRIT

1. The courts below in sustaining the parole revocation and denying Zizzo's Petition for Habeas relied mainly on the alleged association and the bad reputation of Gruttadauro. (R. 161-162). The government claims that over a period of 10 months Gruttadauro visited Zizzo's public restaurant 15 times. The evidence shows that such visits were during the regular hours of the establishment and were made openly and in full view of everyone including the agents of the government. The record further shows that the daughter of Gruttadauro was employed in the restaurant of Zizzo. The government does not contend that Gruttadauro did not have a right to visit any restaurant he pleased, nor that Zizzo had the right to exclude anyone from visiting his restaurant. It contends, however, that on some occasions Zizzo was observed talking to Gruttadauro. On one occasion, that the Federal agents were also in the restaurant, they overheard Gruttadauro and Zizzo talking about such innocuous subjects as real estate in the Crown Point, Indiana area (R. 85). That, according to the government, constitutes "association". Before Zizzo was released on parole, he was asked to and did sign the statement of the conditions under which parole was granted. It contained 12 conditions. Except for No. 11, the rest are clear, precise and apprise any prisoner of what is expected of him. Condition No. 11 provides:

> "That I will not associate with any persons having a criminal record, bad reputation, nor with those engaged in questionable occupations" (R. 144)

The subjective nature and vagueness of this condition has been responsible for the majority of the litigated cases

In *Weir* v. *United States*, (CCA 7) 92 F. 2d 634, 638, the court stated:

> "The word 'associate' signifies to connect closely or join with others in a common purpose, activity or responsibility to partake or share in a common design, and implies participation by each of the individuals so united in the achievement of a common purpose. In its general and ordinary sense, 'associate' signifies confederacy or union for a particular purpose, good or ill".

We are mindful that the *Weir* case did not involve a parole violation. In *DiMarco* v. *Greene*, 385 F.2d 556, the Court of Appeals for the Sixth Circuit reversed the trial court and its interpretation of what constituted "association". The court disagreed with the definition of "association" as stated in the *Weir* case and commencing at page 561, went on to state that to "associate" means,

> "To join often, in a loose relationship as a partner, fellow worker; colleague, friend, companion or ally . . . "

The Court of Appeals for the 9th Circuit, in *Arciniega* v. *Freeman*, 439 F 2d 776, affirmed the trial court's denial of the Writ of Habeas Corpus and cited approvingly the *DiMarco* case, *supra*, and its definition of the word "associate". This Court reversed and stated:

> ". . . here petitioner was forbidden to 'associate' with other ex-convicts. But the board's own regulations require 'satisfactory evidence' of a parole violation to justify an arrest warrant . . . We do not believe that the parole condition restricting association was intended to apply to incidental contracts between ex-convicts in the course of work on a legitimate job for a common employer. Nor is such occupational association, standing alone, satisfactory evidence of non-

> business association violative of the parole restrictions. To so assume would be to render a parolee vulnerable to imprisonment whenever his employer, willing to hire ex-convicts, hires more than one." *Arciniega* v. *Freeman*, 92 S. Ct. 22.

In this case, the trial court citing the *DiMarco* case found that

> "Gruttadauro clearly fitted all three categories, and the contacts observed by the FBI certainly constituted 'association' within the meaning of the Board's regulations" (R. 163).

In the light of the *Arciniega* case, it is apparent that this Court does not accept the narrow interpretation of the word "associate" as defined by the *DiMarco* case.

The rationale of the government seems to be that because the FBI had received unparticularized information from an undisclosed informant that Zizzo was "still in control", it would follow that Gruttadauro's visits to Zizzo's public restaurant had to be for some sinister purpose. In *Sobell* v. *Reed*, 327 Fed. Supp. 1294, at page 1304, the court answered a similar contention of the government and stated:

> "If Sobell means to spy, or to do other things comparable to those for which he sojourned so long in prison, there are surely means more potentially effective in the tunnels and warrens of New York City than in the spotlight of a public banquet in Los Angeles".

Certainly Zizzo, if the contact with Gruttadauro was not innocent and incidental, would have found more potentially effective means of communication than in a public restaurant. Adopting this Court's definition of "association", Zizzo's contact with Gruttadauro would be nothing more than an incidental contact in the course of his work in his

legitimate job of running his restaurant. Any other interpretation would subject a self-employed parolee to imprisonment whenever an objectionable person may decide to visit his place of business.

The government charges that Gruttadauro was a person having a criminal record, by virtue of a conviction in the United States District Court for the Northern District of Illinois, on June 6, 1941, for violation of Title 18 U.S.C. 88 and had a bad reputation and engaged in a questionable occupation (R. 75). Mr. Storey, the FBI agent testified for the government and stated that as of March 20, 1970, the date of the hearing before the Hearing Examiner of the U. S. Parole Board, the FBI was still checking the record of the conviction of Gruttadauro (R. 97), thus making it clear that even the FBI did not know particulars about the conviction. The agent stated that it was for a liquor law violation and that Gruttadauro plead guilty and was placed on probation for one hour (R. 99). The record discloses the following exchange:

> "Mr. Kappos: Mr. Storey, in your experience with courts and juries and investigations, wouldn't you say that it would be a most unusual situation that a person has plead guilty to a felony and the Judge placed him, especially a judge of Judge Barnes' reputation, on probation for one hour?
>
> Mr. Storey: This is what is on his FBI record and I couldn't understand it myself. It is very unusual.
>
> Mr. Wilkinson: May I interject here. At the time of the war, I understand it was the practice of some judges to let people convicted of felonies to go to the service and this is my assumption that the Judge used this device to place them on probation just for the hour that was necessary for him to enlist in the Navy. I don't consider it particularly surprising under the circumstances" (R. 99-100).

Mr. Storey then acknowledged that Gruttadauro received an honorable discharge from the Navy (R. 100).

The record is completely silent as to any evidence that Zizzo ever knew that Gruttadauro had a record of conviction. The Court's attention is invited to the fact that in 1941, 18 U.S.C. 88, was the predecessor 18 U.S.C. 371, and provided that the crime of conspiracy could be a felony or a misdemeanor. It would be logical and a warranted inference that if Gruttadauro was sentenced to one hour's probation, and allowed to enlist in the U. S. Navy, he more than likely was charged with a misdemeanor for some minor violation of liquor laws. Mr. Wilkinson's explanation does not merit consideration. It is a historical fact that the United States of America was not at war with anyone on June 11, 1941. Mr. Storey also made reference to certain articles or "exposes" appearing in the Gary Post Tribune characterizing Gruttadauro as a gambler. (R. 87), and further admitted that the FBI does release information to the press concerning investigations and specifically that it did release information to the local press in regard to Zizzo (R. 112) Mr. Wilkinson, the Parole Officer, also indicated that he knew who might have released the stories to the press (R. 63). No newspaper articles were ever submitted at the hearing before the Parole Board nor were any copies given to Zizzo at any time. The attorney for the government, speaking of the articles in the Gary Post Tribune states:

> "We cannot say these were definitely before the Parole Board but they do verify the story of agent Storey's testimony." (Court reporter's record of proceedings, page 28).

The government did not produce any evidence of any nature that would have shown that Zizzo knew of the conviction of any of the persons involved and especially

of the conviction of Gruttadauro. He has no way of knowing what the "exposes", submitted to the trial court in camera, allege. He does, however, challenge the government to produce even one "expose" that informed the reading public of Gruttadauro's conviction prior to November, 1969. Neither the local newspaper nor Zizzo knew of Gruttadauro's 1941 conviction. It became known only when the FBI so informed the press after the last visit of Gruttadauro to the restaurant in November, 1969, and just prior to the revocation hearing. Zizzo repeatedly denied knowing of Gruttadauro's conviction. We have found no case nor precedent holding that contact by a parolee with a person that has a criminal record without the knowledge of the parolee, constitutes a violation. The *Di Marco* case *supra*, cited by the trial court (R. 163), does not stand for that proposition and at any rate it has, by implication been overruled by the *Arciniega* case. Di Marco had frequently admitted his association with an ex-convict and knowledge of that fact and he was arrested in the company of the ex-convict and burglary tools were found in his possession. To state that a parolee has violated his parole if he ever comes in contact with a person having a prior conviction, regardless as to whether or not the parolee knew of such record, would be tantamount to reducing the concept of a parole legislation to a cruel hoax. Zizzo asked why his Parole Officer never apprised him of any alleged infraction of the parole rules and the Parole Officer's reply was:

> "An investigation of his activities was under way at that time by the FBI. They were keeping us advised as to what they were finding. I did not feel that it was encumbent upon me at that time to warn him to desist doing what he knew was contrary to the rules of Parole".

The Parole Officer went on to say that it was his assumption that Zizzo was aware of violating the rules and that there is no duty on the part of the parole officer to guide a parolee (R. 77 and 78). The government supplied us with the official thinking on this score and stated:

> "The Government would also like to comment on the fact that the Parole Officer failed to tell Zizzo who he was associated with, what they knew about his association. The Parole Board in Washington, and likewise, the Parole Officer locally, receive confidential information from several sources, and in order to do that, they have to protect the identity of the information, and estimate the extent of the information; but as social workers they need this information. The F.B.I. furnished them information about Zizzo.
>
> "I think the Probation Officer put it as well as he could, he asked Zizzo if he had been associating with anyone else, he points out that was part of the conditions he was violating, which was about as far as he could go. *If he completely told him everything the FBI had given him, he wouldn't get any more information from the F.B.I.* I think that his action in this case was most justified and proper." (Court reporter's record, page 32, Lines 2 to 23). (Our emphasis)

Zizzo testified that sometime in 1969, a Mr. Pace, who was then his Parole Officer had asked him if he was associating with any persons having a criminal record and that Zizzo told him that he was not associating with anyone with a record to the best of his knowledge and asked Mr. Pace to give him the names of such persons, and Mr. Pace replied that he did not have any names but would not worry too much about it (R. 39). Zizzo submits that there is nothing in the record to even remotely indicate that he was aware of Gruttadauro's record of some 30 years ago and that under those circumstances, it was the duty of the Parole Board early in 1969 to apprise Zizzo of that fact.

The government's explanation that if the Parole Board had done so, the FBI would not supply any further information, is not valid. The only logical reason that Zizzo was not told in 1969 was the fact that if he were advised that Gruttadauro had a criminal conviction, it would then have been encumbent upon the Parole Board to instruct him and direct Zizzo's course of action thus depriving the FBI and the Parole Board of the opportunity to incarcerate Zizzo on the eve of his release from parole.

The government then asserts that Gruttadauro is a person of bad reputation and engaged in a questionable occupation. To prove that fact, the government relied on the testimony of its own agent, who formed his opinion on the basis of his investigation and the "exposes" appearing in the Gary Post Tribune (R. 86-87).

The Hearing Examiner for the U.S. Parole Board asked the government agent the following question:

> "Have you had occasion to investigate Mr. Gruttadauro's criminal history?"
> "Mr. Storey: We have had Mr. Gruttadauro under investigation for approximately 10 years.
> Mr. Doneghy: On the basis of your investigation, are you in any position to say what type of reputation he has?" (R. 86).

Before a witness can testify as to the reputation of a person, it is pre-supposed that the witness has properly qualified by testifying that he knows what the general reputation of the party was in the community. The witness must profess to know the general reputation of the party in question before he can be heard to speak of his own opinion or of the opinions of others of such reputation, 29 *Am. Jur.* 2d § 343, page 392. The government's

agent was asked specifically if he was in a position to say what type of reputation Gruttadauro had on the basis of the agent's investigation. It was never shown that the agent possessed the necessary testimonial qualifications on the fact issue of the general reputation of Gruttadauro. The agent stated, referring to Gruttadauro,

> "Well, our investigation determined that he has a very bad reputation. He has been characterized as a hoodlum from Chicago and he has been identified as associating with known hoodlums, for the past 10 years . . . Mr. Gruttadauro has been a subject of several 'exposes' in the Gary Post Tribune bringing out his activities as a gambler and his reported association with known gamblers in Gary. His control over these gambling operations and these articles have appeared several times in the newspaper." (R. 87).

There is no scintilla of evidence to indicate who "characterized" the activities of Gruttadauro nor any evidence to show that the agent had any contact with the community at large and was testifying what the reputation of Gruttadauro was in the community as compared to what the newspapers may have reported. Zizzo submits that there is no precedent or authority to the effect that a newspaper's "exposes", especially when, as in this case, information has been given to it by the Federal Bureau of Investigation, constitute nothing more than a mere rumor reflecting nothing more than the opinion of the writer. As was said in *Moore* v. *U. S.*, (5th CCA) 123 F.2d 207, 210:

> "Reputation is derived from what the people in a given community say or do not say about an accused. Mere rumors are not reputation, but reputation involves a notion of the general estimate of a person by the community as a whole. Reputation is not what a few persons say or may think about."

The record is devoid of any evidence that the agent even knew where Gruttadauro lived. In *U. S.* v. *Pincourt,* (3d CCA) 159 F.2d 917, the testimony of a business acquaintance of the defendant was excluded where the witness did not know where defendant lived or any of the people in that community.

Reputation, being the community's opinion, is distinguished from mere rumor in two respects. On the one hand, reputation implies the definite and final formation of opinion by the community; while rumor implies merely a report that is not yet finally credited. On the other hand, a rumor is usually thought of as signifying a bad act or occurrence, while a reputation is predicated upon a general trait of character; a man's reputation, for example, may declare him honest, and yet today a rumor may have circulated that this reputed honest man has defaulted yesterday in his accounts, *Wigmore on Evidence,* 3d Edition, Volume 5, § 1611, page 481. An investigator is not a competent witness to testify on another's general reputation, *Minkow* v. *U. S.,* (CA 4) 5 F. 2d 319. The government agent testified as having received confidential information from informants (R. 113-114). It is clear from the record that the agent testified as to the reputation of Gruttadauro based on the agent's investigation, the newspaper's "exposes" and statements of informants. The information and suspicion held by government agents is not reputation. Reputation means a prevalent or common belief of a number of persons, *U. S.* v. *CIT Corporation,* 93 F. 2d 469; *U. S.* v. *One 1957 Ford,* 197 Fed. Supp. 839, 841. The government has wholly failed to prove by satisfactory evidence that Gruttadauro did in fact have a bad reputation in the general community nor that he was engaged in a questionable occupation. It is not the law that suspicions of an investigative agency fueled and multiplied by irre-

sponsible statements of unknown and undisclosed informants and aired in the press at the request or suggestion of that investigative agency, constitute proof of bad reputation of a person. Proof of reputation is unavoidably hearsay. The time honored requirements of proof of good or bad reputation must be maintained or the whole concept will become meaningless. The Government has failed to prove with satisfactory evidence the alleged bad reputation and questionable occupation of Gruttadauro.

The trial court stated:

> "These hearings bother me, as do probate revocation hearings. Anybody involved in the administration of criminal law ought to be concerned, I think, about weakening either the probation or parole system. Most of all, on a broad basis, criminal lawyers ought to be concerned. Both probation and parole are a privilege, not a right.
>
> If it becomes almost intolerable for a Parole Board or a Court to rectify mistakes when they let people go on parole or probation, then it simply will dry up the parole and probation systems, both.
>
> I find myself wavering, and I use probation, as everybody knows, every time I think it is at all justified; but if the Court of Appeals and other Courts make it so burdensome because of the process you have to go through to correct mistakes when you put people on probation who go bad, or let them out of prison on parole when they don't comply with the rules; then the answer, it seems to me, is obvious, you put nobody on probation, you put nobody on parole; there is no compulsion that you do.
>
> So my sympathies are with Parole Boards, as they are with myself, when I am confronted with all of the rules that have been laid down in order to try to correct a mistake that I made when I put somebody on probation." (Court reporter's record or proceedings, page 34, line 7 to page 35, line 11).

Zizzo respectfully submits that he is not asserting that the Parole Board should not have the power to revoke parole or a court the power to revoke probation. He does assert, however, that before a man is imprisoned, it must appear by satisfactory evidence that he has in fact violated the conditions of his parole.

The government has failed to show by satisfactory evidence that the conduct of Zizzo amounted to "association" within the meaning of the Parole Board rules nor that Zizzo was ever aware of the convictions of any of the persons involved. It further failed to prove the alleged bad reputation and questionable occupation as charged in the warrant application and the supplemental warrant application.

The record as a whole discloses an ardent desire on the part of the FBI to have Zizzo re-committed at the eve of his release from parole, on any pretense or ground. It is hard to believe that if the Parole Officer in 1969, had merely told Zizzo that Gruttadauro was coming to his restaurant, had a record and the Board of Parole would consider such visits grounds for revocation of Zizzo's parole, that the FBI would just cease and refuse to supply the Parole Board with information. Even if that were true, the problem would have been one for the responsible executives of the respective agencies. The government found Zizzo sufficiently rehabilitated to allow him to return to the fold of society where he remained for over three years. He was a gambler and was duly convicted and punished. He believed his government when it told him that he could remain a free man so long as he abided by the laws. He thought he had the right to change and did so, yet at his revocation hearing, his government told him that it believed he belonged to "organized crime" and that once

in "organized crime", always in "organized crime" (R. 69). In effect, Zizzo is told that no matter how hard he tried or how well he behaved after his conviction, his right to change his way of life was forever forfeited when in 1963 he was convicted and the FBI branded him as a member of "organized crime".

If Zizzo was doing anything wrong, it would certainly have been uncovered by the lengthy and intensive surveillance of the FBI. Parole conditions have been traditionally subjective and vague and lower courts have been reluctant in interfering with Parole Board determinations. The *Morrissey* case has set out the sorely needed basic requirements of procedural due process. The problem still remains as to the meaning of vague and subjective parole conditions. Society and the interests of the persons involved would be best served if this Court should decide to set out ascertainable standards and limit the extraordinarily broad power of the Parole Board to re-imprison a person for the maximum period possible and without consideration of the magnitude of the violation, interests of society and of the individual involved.

2. It is apparent on the record and the Court of Appeals found that the proceedings in this case did not fulfill the requirements of the *Morrissey*. Even though the Writ of Habeas Corpus is in a nature of a civil case, in effect, its denial constituted the imprisonment of Zizzo for the additional period of 3½ years. The procedural steps taken in revoking this Petitioner's parole, substantially impaired the truth finding function of the revocation hearing and thus raise serious questions about the accuracy of the Parole Board's decision. Under such circumstances, the dictates of *Morrissey* should apply to this case, *Williams* v. *U. S.*, 91 S. Ct. 1148 (1971).

CONCLUSION

It is respectfully urged that because of the substantial Constitutional importance of the issues raised herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN KAPPOS
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Attorney for Petitioner

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1971 — APRIL SESSION, 1972

No. 72-1234

FRANK ZIZZO,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA, and JAMES TRARGER, UNITED STATES MARSHAL,

Respondents-Appellees.

Appeal from the United States District Court of the Northern District of Indiana, Hammond Division.

Civil No. 72 H 21 — GEORGE N. BEAMER, *Judge.*

ARGUED JUNE 15, 1972 — DECIDED AUGUST 14, 1972

Before FAIRCHILD and SPRECHER, *Circuit Judges,* and CAMPBELL, *District Judge.*[1]

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[1] Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

FAIRCHILD, *Circuit Judge.* This is an appeal from a denial of habeas corpus. Petitioner Zizzo, a federal prisoner, challenges revocation of his parole.

Zizzo began service of a five year sentence June 18, 1965 and was paroled December 19, 1966. On January 16, 1970, a warrant was issued by the board of parole. The warrant application charged Zizzo with Associating with Persons Having a Criminal Record and Engaged in Criminal Activity. It was specified in the application that Zizzo had met with Anthony P. Gruttadauro, Nick Guzzino, Ralph J. Tuccillio, Michael Salerno, and Abe Kushner.

On January 26, 1970, after Zizzo had been taken into custody, the probation officer supervising him on parole held a preliminary interview with Zizzo and his counsel. On February 25, a supplemental application was filed, adding the charge, Associating with Persons Having a Criminal Record, Bad Reputation and Engaged in Questionable Occupations, and specifying the same meetings with Gruttadauro. On March 20, a local parole revocation hearing was held before Hearing Examiner Doneghy. Zizzo was present with his counsel. On April 3, the parole board issued an order: "revoked and continued to expiration."

Zizzo's imprisonment was interrupted from July 14, 1970 until January 31, 1972 as a result of proceedings under 28 U.S.C. §2255, challenging the underlying conviction, at first successfully but ultimately not so, for reasons which are irrelevant to the validity of parole revocation.[2]

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[2] See *Zizzo* v. *United States*, 431 F2d 913 (7th Cir., 1970); 402 U.S. 938, 447 F2d 857 (7th Cir., 1971).

On January 31, 1972, Zizzo filed a petition for writ of habeas corpus, to review the parole revocation proceeding. In addition to various formal documents concerning the revocation, the government presented, for *in camera* inspection only, a copy of the hearing examiner's report, containing findings and recommendations,[3] and the Zizzo file of the local probation office. The government also presented facsimiles of several newspaper stories. As nearly as we can tell from the record, the latter were not presented at the revocation hearing, although there was general reference to newspaper stories, but were available to Zizzo's counsel at the habeas hearing.

The district court denied Zizzo's application for discovery of the examiner's report, and held that although part of the material submitted *in camera* would be admissible under the rules applicable to parole revocation hearings, the revocation was sustainable solely on the basis of the evidence at the revocation hearing and concerning Gruttadauro alone.

We have examined the report and file transmitted to this court under seal, and will refer to the report or the file where we refer to any information from either source.

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[3] We are not told why the parole board insisted on nondisclosure of the report. Perhaps this is simply a policy of the board. The report summarized the proceedings and was at least a tentative decision, without anything to show that the board did otherwise than to adopt it. We can only surmise that the inclusion of a list of "Supportive Documents Incorporated By Reference" and the references on that list to communications from the FBI and Department of Justice and evaluations of parole progress reports in the file may supply the reason for confidentiality. Although those items are listed, the narrative portion of the report, and the findings and recommendations do not indicate that confidential material was relied upon.

Zizzo was originally convicted of fifteen counts of violation of 18 U.S.C. §1952, "Interstate and foreign travel or transportation in and of racketeering enterprises," arising out of the operation of Zizzo's gambling business in Indiana.[4] The character of these offenses explains a special concern of the FBI with any of his activities indicating continued association with gamblers. The file indicates that several reports of suspicions of criminal activity were relayed to the probation officer supervising Zizzo on parole, but these were not supported by any proof. Later, reports of surveillance and meetings of Zizzo, usually at a pizza restaurant Zizzo operated in Gary, with Gruttadauro and others, led to the first application for warrant.

At the preliminary interview, Zizzo produced Guzzino, Kushner, and Salerno (three of the persons specified) as voluntary witnesses. Tuccillio was dead, leaving only Gruttadauro, who did not appear. The report indicates that the examiner found the evidence insufficient to sustain the charge of associating with persons having a criminal record and engaged in criminal activity. He noted the absence of satisfactory evidence that these persons were currently engaged in criminal activity and that the convictions of those who had any criminal record were remote in time. The examiner did, however, find as facts that Gruttadauro had a bad reputation and that Zizzo was associating with him.

Zizzo had admitted to the probation officer that he had seen Gruttadauro frequently, as many as two to four times a week and conversed 20 minutes to a half hour, and that they were close friends, but denied that their conversations were about gambling or other illegal activities. Although the record includes sporadic statements by Zizzo that

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[4] *United States* v. *Zizzo*, 338 F2d 577 (7th Cir., 1964).

Gruttadauro came to the restaurant to eat, and that Zizzo had no knowledge of Gruttadauro's violating any law, and it appears that one of Gruttadauro's daughters was employed by Zizzo, Zizzo offered no full description either of what he knew about Gruttadauro's reputation or of the subjects of their conversations. He did not say whether or not he had read newspaper articles about Gruttadauro.

An FBI agent testified that Zizzo and Gruttadauro were observed at the restaurant 13 times from February 24, 1969 to December 19, 1969, four times being in October. He also stated that on October 30, Zizzo and Gruttadauro were observed conversing at a different pizza establishment. This was a place where Zizzo bought pizza dough, but it did not open for business until just before the time the two men left, and their cars were parked in the rear for at least 45 minutes before opening.

With reference to Gruttadauro's reputation, the agent said he had a very bad reputation, has been characterized as a hoodlum from Chicago and identified as associating with known hoodlums for the past ten years, has operated high stake poker games, barbutte games, and has been in control of numerous horse books in Gary. The agent said Gruttadauro had been a subject of several exposés in the Gary Post-Tribune bringing out his activities as a gambler and his reported association with known gamblers.

One of the articles presented to the district court and dated June 21, 1968, reporting an arrest of Gruttadauro and others on gambling charges, referred to him as "reputed boss of crime syndicate gambling in Lake County."

We agree with the district court that the information produced at the hearing gave factual support for the charge that Zizzo violated the conditions of his parole by associating with a person of bad reputation. We also

agree that the procedures involved did not violate the standards heretofore applied to federal parole revocation.[5] There was a hearing, at which Zizzo was represented by counsel. He had notice of the charges and of specific instances claimed. Rules of evidence were greatly relaxed. The FBI agent testified (although apparently no witness was put under oath) and was cross-examined, although some of his testimony was hearsay. His description of Gruttadauro's reputation was corroborated by at least one clipping from a local newspaper, ascribing a similar reputation and reporting Gruttadauro's arrest.

Zizzo relies on *Arciniega* v. *Freeman*,[6] holding that incidental contacts between a parolee and another ex-convict in the course of work on a legitimate job for a common employer do not establish "association" forbidden by the terms of parole. It is clear in this case, however, that the board did not accept Zizzo's claim that his contacts with Gruttadauro were no more than ordinary conversation between restaurant proprietor and customer, and there was evidence of association beyond that context.

Since oral argument in this case, the Supreme Court decided *Morrissey* v. *Brewer*, ... U.S. ..... (June 29, 1972), setting out basic requirements for parole revocation proceedings. The case involved parole under the law of a state, but its teaching as to the requirements of due process must logically apply to federal parole. In several respects the proceeding in Zizzo's case did not fulfil the specific requirements set forth in Part III of *Morrissey*.

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[5] *Hyser* v. *Reed*, 318 F2d 225 (D.C. Cir., 1963); *United States ex rel. Carioscia* v. *Meisner*, 331 F2d 635 (N.D. Ill., 1971).

[6] 404 U.S. 4 (1971).

Morrissey requires "(f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." The document in this case which most closely approaches requirement (f) is the examiner's report. To fulfil the requirement, however, we think the report would have to have been adopted by the board, as the ultimate factfinder. Presumably (f) implies that the written statement must be made known to the parolee, and it would seem logical to us, where the statement is first tentatively compiled by a single officer and later adopted by a board, it must be made known to the parolee, and he given an opportunity to object by written submission before adoption. This report has, however, been kept secret. We do not find, from our own perusal of the report, that the examiner, in making any material finding, relied on confidential material, but we note that, under *Morrissey,* there are two other requirements which bear on the use of confidential material: There must be "(b) disclosure of the parolee of evidence against him" and he must have "(d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." Earlier steps of the procedure in Zizzo's case were also inconsistent with *Morrissey* requirements.

The requirements set out in Part III of *Morrissey,* however, are said to be "applicable to future revocations of parole," and thus limited to prospective effect beginning June 29, 1972. Accordingly we do not apply them here.

The judgment appealed from is affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

FRANK N. ZIZZO

vs.

UNITED STATES OF AMERICA and JAMES TRAEGER, U. S. MARSHAL

Civil No. 72 H 21

ORDER

On January 31, 1972, Frank N. Zizzo filed a petition for writ of habeas corpus. A hearing having been duly held, and the evidence having been duly considered, the petition is DENIED.

George N. Beamer
U. S. District Judge

Enter: March 8, 1972

MEMORANDUM

On July 10, 1963, a jury found petitioner guilty on fifteen counts of interstate transportation in aid of racketeering, in violation of 18 U.S.C. §1952. On August 28, 1963, he was sentenced to five years imprisonment on each count, the sentences to run concurrently. His conviction was affirmed on direct appeal, and the Supreme Court denied certiorari.

Petitioner began service of his sentence on June 18, 1965, and was granted parole effective December 19, 1966. On January 16, 1970, Acting Parole Executive Arnold J.

Vodvarka filed a warrant application charging petitioner with "associating with persons having a criminal record and engaged in criminal activity." The United States Board of Parole issued a warrant, and petitioner was taken into custody. Petitioner's parole officer held a preliminary interview on January 26, 1970, and on February 25, 1970, the Acting Parole Executive filed a supplemental warrant application charging the additional violations of "associating with persons having a bad reputation and engaged in questionable occupations." A local parole revocation hearing was held by a parole examiner on March 20, 1970, and on April 3, 1970, the Board of Parole entered an order revoking petitioner's parole.

Petitioner resumed service of his sentence at the United States Penitentiary, Marion, Illinois; but in the meantime, he had appealed this court's denial of a motion under 28 U.S.C. §2255, and by order of the Court of Appeals, he was released on July 14, 1970, pending disposition of the appeal. His conviction was thereafter set aside, but the Supreme Court granted certiorari and remanded with instructions to reconsider. Upon reconsideration, the Court of Appeals reversed its prior decision, recalled its mandate, and affirmed this court's denial of the motion. The revised mandate reached this court on January 27, 1972, and petitioner surrendered to the United States Marshal on January 31, 1972.

Petitioner has now filed a petition for habeas corpus, contending that the revocation of his parole was arbitrary, capricious, and in violation of his rights under the First Amendment. Having thoroughly reviewed the evidence, the court finds the contrary.

1. *The Charges*

The original warrant application charged petitioner with "associating with persons having a criminal record and engaged in criminal activity." In support of that charge, it stated that on fifteen specified dates, agents of the F.B.I. had observed petitioner meeting with one Anthony J. Gruttadauro, characterized as having a criminal record in Chicago, Illinois, and as having been convicted for conspiracy in a United States District Court in 1941. In addition, it stated that petitioner had been observed by an officer of the Indiana State Police speaking to one Nick Guzzino at a restaurant. Guzzino was characterized as a bookie operating a frequently-raided gambling establishment. The application further charged that petitioner had been observed by agents of the F.B.I. meeting with one Ralph Tuccillio at a restaurant operated by petitioner. Tuccillio was characterized as having had a lengthy arrest record, and as having operated a restaurant in Highland, Indiana, part of which petitioner took over after Tuccillio's death. The application also charged that F.B.I. agents had observed petitioner meeting with Michael Salerno and Abe Kushner, the former characterized as having a "lengthy police record," and the latter as having an arrest record. Finally, the application referred to "information submitted by USPO Wilkinson, Northern District of Indiana, in his letters of 10-7-69, 12-22-69 and 1-6-70 with enclosures."

The supplementary warrant application broadened the formal charges to include "associating with persons having a bad reputation and engaged in questionable occupations," but contained no new specifications, simply repeating the allegations of the original application concerning Gruttadauro.

2. *The Evidence*

The evidence offered at the hearing included (1) transcripts of petitioner's preliminary interview and revocation hearing, (2) copies of the original and supplementary warrant applications, (3) a copy of the warrant, and (4) a copy of the Board's order revoking petitioner's parole. These items were all admitted into evidence without objection. In addition, the government offered, in camera, (1) a copy of the parole examiner's summary of the local revocation hearing, including his findings and recommendations to the Board, (2) the entire file of the local probation office, and (3) facsimiles of various materials from the Board's file. Petitioner objected to the admission of the latter items, and the court ordered them sealed, subject to a subsequent determination as to admissibility.

The court is of the opinion that evidence offered in camera is admissible in support of the Board's determination so long as (1) the evidence in question was before the Board when the determination was made, and (2) the evidence relates to the specific conduct charged in the warrant application. *Cf. Alvarez* v. *Turner,* 422 F.2d 214 (10th Cir. 1970); *Hyser* v. *Reed,* 318 F.2d 225 (D.C. Cir. 1963, *cert. denied sub nom. Jamison* v. *Chappell,* 375 U.S. 957. Applying that rule to the present case, part of the evidence offered in camera by the government would be admissible.

However, in the court's opinion, the Board's determination is sustainable simply on the basis of the evidence introduced at petitioner's revocation hearing, and admitted here without objection. Accordingly, out of an abundance of caution, the court has not considered the challenged evidence, and rests its decision solely on the open record.

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The evidence at the revocation hearing established that during his parole, petitioner was the proprietor of two pizza parlors. An agent of the F.B.I. testified that the Bureau had received information that despite his status as a parolee, petitioner was "still in control" of organized crime in Lake County, Indiana, and that petitioner and his restaurants were therefore kept under surveillance.

The agents testified that on fifteen separate occasions, he and other agents had observed petitioner meeting with one Anthony Gruttadauro, an individual regarded by the Bureau as an influential member of organized crime and an associate of known hoodlums. He stated that for the past ten years, Gruttadauro had been operating high-stakes poker games, barbutte games, and "numerous" horse-books. Confirming the agent's testimony was a newspaper article from the Gary Post-Tribune of June 21, 1968, reporting Gruttadauro's arrest in a raid on a gambling establishment, and characterizing him as "the reputed boss of crime syndicate gambling in Lake County, Indiana."

The agent testified that the meeting between Gruttadauro and petitioner at petitioner's restaurant involved "conversations," and were something more than the minimal contacts expected between a restaurant proprietor and a customer. In an earlier interview with his parole officer, petitioner himself had admitted conversations lasting from twenty minutes to a half-hour, claiming, however, that their subject matter was innocent.

In addition, the agent testified that on one occasion, petitioner and Gruttadauro were together in a pizza parlor owned by a third party (the son of a deported criminal and a former associate of petitioner's) for at least forty-five minutes, before the establishment was open for business.

There was other evidence as well, relating primarily to the other individuals named in the original warrant application, but a summary would serve no purpose here. In the court's opinion, the evidence concerning Gruttadauro alone was more than sufficient to justify the Board in finding a violation and revoking petitioner's parole. When he accepted parole, petitioner expressly undertook "[t]hat I will not associate with persons having a criminal record, bad reputation, nor with those engaged in questionable occupations." Gruttadauro clearly fitted all three categories, and the contacts observed by the F.B.I. certainly constituted "association," within the meaning of the Board's regulations. *See DiMarco* v. *Greene*, 385 F.2d 556, 561 (6th Cir. 1967). *Contrast Arciniega* v. *Freeman*, ... U.S. ....., 30 L.Ed. 126 (1971).

Petitioner's contention that the conditions of his parole, so construed, violated his rights to freedom of speech and association under the First Amendment, can only be described as frivolous. Even the cases cited by the petitioner recognize that a parolee's First Amendment rights can properly be restricted to serve a "compelling state interest." *See Sobell* v. *Reed*, 327 F.Supp. 1294, 1303 (S.D.N.Y. 1971). The compelling state interest in preventing association between a person on parole after a conviction for interstate gambling and persons like Gruttadauro is obvious.

The court is convinced that the Board's determination was fully supported by the evidence. Petitioner's motion for habeas corpus relief is therefore DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-389

FRANK ZIZZO, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1963, after a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on fifteen counts charging travel in interstate commerce with intent to carry on an illegal gambling enterprise, in violation of 18 U.S.C. 1952. He was sentenced to concurrent prison terms of five years and fined $10,000. The conviction was affirmed, 338 F.2d 577 (C.A. 7), and certiorari was denied, 381 U.S. 915. After serving part of his sentence, petitioner was paroled in December 1966. In January 1970 a parole violator's warrant was issued. After an evidentiary hearing before an examiner, the Board of

Parole entered an order on April 3, 1970, revoking petitioner's parole.[1] On January 31, 1972, petitioner filed a petition for a writ of habeas corpus, contending that the revocation of his parole was arbitrary, capricious, and in violation of his rights under the First Amendment. The district court denied the petition with an opinion (Pet. App. B). The court of appeals affirmed (Pet. App. A).

Petitioner contends that the revocation of his parole was not supported by satisfactory evidence as to his association with a person having a bad reputation, and that the court of appeals erred in not following this Court's holding in *Morrissey* v. *Brewer,* No. 71-5103, decided June 29, 1972, as to the proper procedures for parole revocation proceedings. These claims are answered in the opinion below, on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1972.

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[1] Petitioner then resumed service of his sentence. On July 14, 1970, he was released pending an appeal from a denial of a motion under 28 U.S.C. 2255. On January 31, 1972, following disposition of that appeal, appellant surrendered to the United States Marshal and filed the present petition. See *Zizzo* v. *United States,* 447 F.2d 857 (C.A. 7).

☆ U.S. Government Printing Office: 1972—479-067/251